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No. 84-1414 (3)

In the

Supreme Court of the United States

OCTOBER TERM, 1984

FREDRIC HABERMAN, *et al.*,

Petitioners,

v.

CHEMICAL BANK AND WASHINGTON PUBLIC POWER SUPPLY SYSTEM, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

COLUMBIA RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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April 8, 1985

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This Brief In Opposition is submitted on behalf of the following respondents, which for convenience are referred to collectively as the "Columbia Respondents" or "these respondents":

Columbia Rural Electric Association, Inc.

Blachly-Lane County Cooperative Electric Association

Central Electric Cooperative, Inc.

Columbia Basin Electric Cooperative, Inc.

Consumers Power, Inc.

Coos-Curry Electric Cooperative, Inc.

Douglas Electric Cooperative, Inc.

Hood River Electric Cooperative

Lane Electric Cooperative, Inc.

Midstate Electric Cooperative, Inc.

Salem Electric

Umatilla Electric Cooperative Association

Wasco Electric Cooperative, Inc.

Kootenai Electric Cooperative, Inc.

Fall River Rural Electric Cooperative, Inc.

Lost River Electric Cooperative, Inc.

Raft River Rural Electric Cooperative, Inc.

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QUESTION PRESENTED

Did the Washington Supreme Court unconstitutionally deprive petitioners of due process of law by denying petitioners' motion to intervene when the case had already been fully litigated at the trial court level and was on its second appeal to the Washington Supreme Court, where the basis for the denial was that the motion to intervene was untimely under Washington law and that the petitioners were adequately represented by the plaintiff in the action (their bond trustee), and where petitioners' proposed claim-in-intervention were and are the subject of a separate action by petitioners in the state trial court?

PARTIES TO THE PROCEEDINGS

The seventeen respondents on whose behalf this Brief In Opposition is submitted are listed on the inside front cover. They are rural electric cooperatives located in Washington, Oregon and Idaho and have no parent companies, subsidiaries or affiliates within the meaning of Rule 28.1 of this Court.

Petitioners failed to include in their list of respondents two groups of parties which had intervened in the trial court proceedings below. One group consisted of ratepayer associations and individual ratepayers of certain Washington public utility districts, and the other group consisted of ratepayers of the City of Ellensburg, Washington.

REASONS FOR DENYING THE WRIT

Petitioners contend that the Washington Supreme Court violated the federal constitution by denying petitioners' motion to intervene in that court when the case had already been fully litigated at the trial court level and the case was on its second appeal to the state supreme court, and where the petitioners were asserting the same claims in a separate action in the trial court. This absurd contention presents no substantial federal question worthy of review by this Court.

Petitioners cite no Washington statute or judicial decision establishing any recognized procedure for private parties to intervene in appellate proceedings. Washington does have a rule of procedure, analogous to Rule 24 of the Federal Rules of Civil Procedure, governing intervention in the trial court period. Washington Civil Rule 24 allows intervention of right "[u]pon timely application . . . , unless the applicant's interest is adequately represented by existing parties." Here, petitioners' motion to intervene in the state supreme court was obviously untimely, and petitioners' interests were more than adequately represented by their bond trustee.

In any event, no question arises under the federal constitution when a state court denies a motion to intervene in a state court appellate proceeding. Petitioners have cited no authority suggesting otherwise. The only authority petitioners cite in support of their contention that a denial of intervention "goes to the heart of due process" (Pet. at 27) is *Local 283, International Union of United Automobile Workers of America v. Scofield*, 382 U.S. 205 (1965). That case held nothing of the kind. In that case this Court looked to the "statutory design" of the National Labor Relations Act in concluding that parties who are successful in unfair labor practice proceedings before the NLRB should be allowed to intervene in the Court of Appeals in proceedings

to review NLRB decisions. The Court expressly limited its analysis to such proceedings. 382 U.S. at 210. That case gives no support whatsoever to petitioners' contention that a private party may have a federal constitutional right to intervene in a state court appellate proceeding.

Indeed, even in reviewing a *federal* court's application of *federal* rules of procedure in a case involving important *federal* civil rights, this Court has stated:

> "Intervention in a federal court suit is governed by Fed Rule Civ Proc 24. Whether intervention be claimed of right or as permissive, it is at once apparent, from the initial words of both Rule 24(a) and Rule 24(b), that the application must be 'timely.' If it is untimely, intervention must be denied. Thus, the court where the action is pending must first be satisfied as to timeliness. Although the point to which the suit has progressed is one factor in the determination of timeliness, it is not solely dispositive. Timeliness is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review."

NAACP v. New York, 413 U.S. 345, 365-366 (1973). Surely the constitution produces no different result when the case involves a state court's application of state rules of procedure in a case involving only state law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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